

**Before the  
UNITED STATES COPYRIGHT ROYALTY BOARD  
Washington, D.C.**

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**In the Matter of:**

**DETERMINATION OF RATES  
AND TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS  
(*Phonorecords IV*)**

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**Docket No. 21-CRB-0001-PR  
(2023-2027)**

**AMAZON’S MOTION TO COMPEL THE COPYRIGHT OWNERS TO  
COMPLY WITH PRODUCTION COMMITMENTS**

The Judges should compel the Copyright Owners to comply with their commitments to produce responsive documents in rebuttal discovery. All of the documents at issue in this Motion directly relate to the Copyright Owners’ Written Rebuttal Statement, and the Copyright Owners agreed to produce responsive documents. But as of the date of this Motion, Amazon has not received the documents that the Copyright Owners said that they would produce. Amazon thus is filing this Motion to ensure that the Copyright Owners keep their end of the bargain. The Judges should grant it, just as they granted similar motions during direct discovery when the Copyright Owners agreed to produce responsive documents but failed to follow through. *See, e.g.,* Order Granting in Part and Denying in Part Services’ Motion to Compel Production of Documents at 5 (May 2, 2022); Order Approving Subpoenas and Granting Amazon’s Motion to Compel at 3 (May 16, 2022). The same result should obtain here. These documents are directly related to specific claims the Copyright Owners make in their rebuttal testimony, yet the Copyright Owners have failed to produce responsive documents without explanation. As in direct discovery, the Judges should compel the Copyright Owners to remedy this deficiency for each of the Requests set forth below.

## BACKGROUND

On May 3, 2022, Amazon and Spotify served Requests for Production on the Copyright Owners. *See* Services’ Motion to Compel the Copyright Owners to Produce Documents (May 24, 2022), Masterman Decl., Ex. 1 (Amazon and Spotify’s Set of Rebuttal Requests for Production of Documents to the Copyright Owners (May 3, 2022)).<sup>1</sup> The Copyright Owners initially agreed to search for and produce responsive documents for several of Amazon’s and Spotify’s Requests, including most of the Requests at issue in this Motion. *See id.*, Ex. 3 (Copyright Owners’ Responses and Objections to the First Set of Rebuttal Requests for Production from Amazon.com Services LLC and Spotify USA Inc. (May 13, 2022)).

On May 17, 2022, the Services and the Copyright Owners met and conferred regarding the Copyright Owners’ objections to certain Requests. *See id.*, Ex. 5 (Email from J. Branson to M. Harris (May 17, 2022)). In subsequent correspondence, the Copyright Owners confirmed that they would produce documents responsive to additional Requests at issue here, including Requests 6 and 7. *See id.*, Ex. 6 (Email from M. Harris to J. Branson (May 19, 2022)). Under the Order Following April 7, 2022 Status Conference, the rebuttal discovery period ended on May 20, and today is the deadline to file rebuttal discovery motions. Yet the Copyright Owners have not produced most of the responsive documents that they committed to produce. *See id.*, Ex. 10 (Email from C. Young to Pryor Cashman (May 23, 2022)).<sup>2</sup> Based on Amazon’s review

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<sup>1</sup> All citations to the “Masterman Decl.” in this Motion refer to the Declaration of Clayton J. Masterman accompanying the Services’ Motion to Compel the Copyright Owners to Produce Documents.

<sup>2</sup> As of the time of filing, the Copyright Owners have not responded to Amazon’s May 23, 2022 email inquiring into the status of their production.

of the Copyright Owners’ productions, significant deficiencies exist for all of the Requests subject to this Motion.

### **ARGUMENT**

The Copyright Owners must produce any requested documents that are “directly related” to their Written Rebuttal Statement. 37 C.F.R. § 351.5(b)(1). “Documents directly related to a topic that a participant has put ‘in issue’ or made ‘a part of its case’ in its written testimony may also be ‘directly related’ to the [written testimony] and thus discoverable.” Discovery Order 9, Order Granting in Part and Denying in Part Services’ Omnibus Motion to Compel SoundExchange to Produce Documents at 3, Dkt. No. 14-CRB-0001-WR (2016-20) (Jan. 15, 2015). The Requests at issue meet that standard, and the Copyright Owners have not met their commitment to produce responsive material. The Judges should compel them to do so.

#### **I. THE COPYRIGHT OWNERS MUST PRODUCE APPROVAL MEMORANDA AND VALUATION DOCUMENTS FOR THE LICENSE AGREEMENTS DISCUSSED IN THEIR REBUTTAL SUBMISSION (REQUEST NOS. 1, 32)**

Request Nos. 1 and 32 seek approval memoranda and internal valuation documents relating to 14 enumerated agreements—ten listed in Request No. 1 and four listed in Request No. 32—that the Copyright Owners discuss in their Written Rebuttal Statement. Masterman Decl., Ex. 1 at 11, 17. The Copyright Owners agreed to produce the approval memoranda and internal valuation documents concerning the licenses identified in these Requests. Masterman Decl., Ex. 3 at 5-6, 19-20. But to date, the Copyright Owners largely have not produced these documents.<sup>3</sup> This material is directly related to the Copyright Owners’ Written Rebuttal

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<sup>3</sup> The Copyright Owners have produced UMPG approval memoranda for agreements listed in Request No. 1, but have produced no other approval memoranda and appear to have produced no valuation documents.

Statement. The Copyright Owners specifically cite each of these licenses in rebuttal testimony,<sup>4</sup> and the Judges repeatedly have held that a participant’s invocation of a benchmark justifies discovery into valuation documents about those benchmarks. *See, e.g.*, Order Approving Subpoenas and Granting Amazon’s Motion to Compel at 1-2 (May 16, 2022) (approving issuance of subpoenas to discover “valuations of the license agreements and alleged litigation threats from music publishers” that Copyright Owners “put at issue in the proceeding”). The Judges should compel the Copyright Owners to honor their commitment to produce documents related to the licenses on which they rely.<sup>5</sup>

## **II. THE COPYRIGHT OWNERS MUST PRODUCE DOCUMENTS DIRECTLY RELATED TO SPECIFIC ASSERTIONS MADE BY A SONY EXECUTIVE (REQUEST NOS. 73-74, 77, 80-82) AND A PEERMUSIC EXECUTIVE (REQUEST NOS. 88-93)**

Request Nos. 73-74, 77, and 80-82 seek emails and other documents from Sony relating to specific claims made, and calculations offered, by Peter Brodsky in his Written Rebuttal Testimony. Masterman Decl., Ex. 1 at 22-24; *see* Brodsky WRT ¶¶ 10, 13, 18-19, 37-38. Similarly, Request Nos. 88-93 seek emails and other documents from peermusic relating to specific conversations, licensing negotiations, and licensing agreements that Timothy Cohan discussed in his Written Rebuttal Testimony. Masterman Decl., Ex. 1 at 24-25; *see* Written Rebuttal Testimony of Timothy Cohan (“Cohan WRT”) ¶¶ 8-9, 12-18, 24. These Requests

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<sup>4</sup> *See* Masterman Decl., Ex. 1 at 11, 17 (listing agreements and citing Written Rebuttal Testimony of Peter Brodsky (“Brodsky WRT”) ¶¶ 57-58, 60, 67, 80-81; Written Rebuttal Testimony of Kokakis ¶¶ 15, 18-19, 22, 31, 27, 46, 48, 50; Written Rebuttal Testimony of Natalie Madaj ¶¶ 10-30; and Written Rebuttal Testimony of Antony Bebawi ¶ 25 n.7).

<sup>5</sup> The Copyright Owners also have not produced valuation documents for [REDACTED] listed in Request No. 105. Masterman Decl., Ex. 1 at 27. This Request is addressed in Amazon’s and Spotify’s Motion to Compel the Copyright Owners to Produce Documents About Their New Rebuttal Benchmarks.

directly relate to the Copyright Owners’ Written Rebuttal Statement—indeed, most of the Requests quote Mr. Brodsky’s or Mr. Cohan’s rebuttal testimony. *See, e.g.*, Masterman Decl., Ex. 1 at 22, Request No. 73 (quoting Brodsky WRT ¶ 10 and asking for documents underpinning [REDACTED]).

The Copyright Owners agreed to produce responsive documents from Sony and peermusic. Masterman Decl., Ex. 3 at 37-41, 43-45. But to date, the Copyright Owners largely have not produced the documents.<sup>6</sup> The Judges should require them to do so.

These Requests go to important themes in the Copyright Owners’ Written Rebuttal Statement. Mr. Brodsky devotes nearly 40 paragraphs to downplaying the 2019 Sony-Amazon license as a benchmark, asserting (among other things) that [REDACTED]. Brodsky WRT ¶¶ 3-41. As part of that narrative, Mr. Brodsky asserts that [REDACTED]. *Id.* ¶¶ 18-19. Amazon requested all analysis reflecting this [REDACTED], *see* Masterman Decl., Ex. 1 at 23 (Request No. 77), but Sony has produced nothing. Similarly, Mr. Brodsky [REDACTED]. Brodsky WRT ¶¶ 37-39. As support, he attached [REDACTED].

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<sup>6</sup> The Copyright Owners have produced some documents responsive to Request No. 91, but have produced no internal peermusic correspondence discussing [REDACTED].” Masterman Decl., Ex. 1 at 25.

[REDACTED]. *See* COEX-2.37.

Amazon requested that data, *see* Masterman Decl., Ex. 1 at 24 (Request No. 82), and Sony agreed to produce it. But Sony has not followed through. The other Sony requests are comparable. All directly relate to Mr. Brodsky's [REDACTED], yet Sony has produced no new documents about it.

The Requests for peermusic are similar. Mr. Cohan makes several assertions about Amazon's treatment of Prime Music, including that Amazon [REDACTED].

Cohan WRT ¶¶ 6-12. In support of that charge, he references his [REDACTED]. *Id.* ¶¶ 8-9. He also asserts that peermusic was [REDACTED] and claims that [REDACTED].

[REDACTED]. *Id.* ¶¶ 10-11. Amazon sought documents about these assertions, including documents pertaining to [REDACTED].

[REDACTED]. *See* Masterman Decl., Ex. 1 at 24-25 (Request Nos. 88-93). The Copyright Owners agreed to search for documents but have produced none.

### **III. THE COPYRIGHT OWNERS MUST PRODUCE DOCUMENTS ON MUSIC PIRACY (REQUEST NOS. 6, 7)**

Request Nos. 6 and 7 seek documents relating to “the effect that Interactive Streaming Services have had on music piracy from 2001 to the present,” documents “concerning the efforts by the Copyright Owners . . . to bring lawsuits against Napster, Grokster, MP3.com, and ‘against the most egregious individual users,’” and “[a]ll analyses . . . concerning ‘stream ripping.’” Masterman Decl., Ex. 1 at 12-13. These Requests directly relate to the Written Rebuttal

Testimonies of both Ms. Danielle Aguirre and Mr. Brodsky, who discuss music piracy at length. Ms. Aguirre, the General Counsel of the NMPA, discusses the “role played by music publishers and the NMPA in successfully fighting and reducing piracy” as rebuttal to the Services “claim[ing] much of the credit for the reduction in record piracy.” Written Rebuttal Testimony of Danielle Aguirre (“Aguirre WRT”) ¶ 6; *see also id.* ¶¶ 11-15 (arguing the Services “did not stop” music piracy and streaming is now “the means for a significant source of piracy: ‘stream ripping’”; and discussing the “anti-piracy campaigns” by the NMPA and its members, including the lawsuits identified in Request No. 7). Mr. Brodsky likewise devotes several paragraphs of his testimony to piracy, including asserting that lawsuits against Grokster, Napster, MP3.com and Limewire reduced piracy before the advent of interactive streaming and that the Services enable piracy through stream ripping. Brodsky WRT ¶¶ 82-84. The Requests directly relate to this testimony, and the Copyright Owners have committed to providing responsive documents. *See Masterman Decl.*, Ex. 6 at 3. Because the Copyright Owners have not done so, the Judges should compel them to follow through.

#### **IV. THE COPYRIGHT OWNERS MUST PRODUCE DOCUMENTS ABOUT PUBLISHER COSTS AND CHARGES (REQUEST NOS. 12-13)**

Request Nos. 12 and 13 seek documents sufficient to show “each Music Publishers’ costs of licensing administration for Section 115 royalties” and “to register their musical work information with the MLC.” *Masterman Decl.*, Ex. 1 at 13. These Requests directly relate to Ms. Aguirre’s Written Rebuttal Testimony, which asserts that the publishers’ costs have not “been reduced by the assumption of the work by the [Mechanical Licensing Collective (“MLC”)] and the obligation of the Services to fund the operation of the MLC” and that publishers “must still properly register their musical work information with the MLC.” Aguirre WRT ¶¶ 28-29.

The Copyright Owners agreed to produce responsive documents, *see* Masterman Decl., Ex. 3 at 11-12, but have produced responsive documents only from Sony. As of the date of this Motion, the Copyright Owners have not produced documents from any other publisher. Again, the Judges should compel them to do so.

**V. THE COPYRIGHT OWNERS MUST PRODUCE DOCUMENTS ABOUT STREAMING’S EFFECT ON OTHER INCOME AND COMPLEMENTARY REVENUES (REQUEST NOS. 8, 115)**

Request No. 8 seeks documents relating to “the impact of streaming on ‘other forms of income.’” Masterman Decl., Ex. 1 at 13. This Request directly relates to Ms. Aguirre’s rebuttal testimony that streaming royalties have not increased sufficiently in part because “streaming has substituted for instead of enhanced other forms of income.” Aguirre WRT ¶ 19.

Relatedly, Request No. 115 seeks documents regarding inquiries, analysis, and estimates of the “‘complementary value of music streaming to the Services’ or their corporate affiliates.” Masterman Decl., Ex. 1 at 29. Request No. 115 directly relates to the rebuttal testimony of Dr. Eisenach, who criticizes the Services’ rate proposals as “vulnerable to royalty diminution” due to “the large and growing complementary value of music streaming to the Services.” Written Rebuttal Testimony of Jeffrey A. Eisenach ¶ 4.

For both Request Nos. 8 and 115, the Copyright Owners agreed to produce responsive documents.<sup>7</sup> But as of the date of this Motion, they have not done so. The Judges should require them to fulfill that commitment.

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<sup>7</sup> For Request No. 8, the Copyright Owners initially agreed to produce documents only from the NMPA, *see* Masterman Decl., Ex. 3 at 9, but subsequently agreed “to search for formal analyses, memoranda and presentations responsive to this request on behalf of the six publishers responding,” *id.*, Ex. 6 at 2.



## **VI. THE COPYRIGHT OWNERS MUST PRODUCE DOCUMENTS REGARDING AUDITS PERFORMED BY WAYNE COLEMAN (REQUEST NOS. 61-62)**

Request Nos. 61 and 62 seek documents concerning “the two audits performed by” Amazon’s expert witness, Wayne Coleman, “that are discussed” in Mr. JW Beekman’s rebuttal testimony, including “any claims for ‘black box’ income in audits performed by Wayne Coleman.” Masterman Decl., Ex. 1 at 21. Mr. Beekman testified that he is “aware of only two audits that Mr. Coleman has conducted of UMPG over the past decade.” Written Rebuttal Testimony of JW Beekman (“Beekman WRT”) ¶ 21; *see also id.* ¶¶ 23, 45, 47. Mr. Beekman also testified that Mr. Coleman “made claims” for “so-called ‘black box’ income” in his audits of UMPG. *Id.* ¶ 45. Request Nos. 61 and 62 directly relate to this testimony, and the Copyright Owners committed to producing responsive documents. Masterman Decl., Ex. 3 at 32-33. The Judges should hold them to that commitment.

## **VII. THE COPYRIGHT OWNERS MUST PRODUCE SONY DOCUMENTS RELATED TO PRO AGREEMENTS (REQUEST NO. 70)**

Request No. 70 seeks the “currently operative agreements between Music Publishers and [Performing Rights Organizations (“PROs”)], including PRO administrative agreements.” Masterman Decl., Ex. 1 at 22. The Copyright Owners’ witnesses, including Mr. Beekman and Mr. Thomas Kelly, discuss such agreements at length in their rebuttal submissions. *See, e.g.*, Beekman WRT ¶¶ 68-70 (discussing “co-publishing agreements” and explaining that “[w]hen UMPG does direct deals providing for direct payment of the publisher’s share of performance income, the publishers’ share is not burdened by the PRO fees while the songwriter share, paid directly to the PRO, is subject to a PRO fee”); Written Rebuttal Testimony of Thomas Kelly ¶¶ 9, 49-51 (discussing “the manner in which the PROs compute royalties” and “charge fees”).

The Copyright Owners agreed to produce responsive documents, *see* Masterman Decl., Ex. 3 at 36, and have produced responsive documents from peermusic, UMPG, and Warner Chappell. But as of the date of this Motion, the Copyright Owners have not produced the PRO administrative agreements from Sony. The Judges should compel them to do so.

### **CONCLUSION**

The Judges should grant the Motion.

Dated: May 24, 2022

Respectfully submitted,

/s/ Joshua D. Branson

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# Proof of Delivery

I hereby certify that on Tuesday, May 24, 2022, I provided a true and correct copy of the Amazon's Motion to Compel the Copyright Owners to Comply with Production Commitments (PUBLIC) to the following:

Spotify USA Inc., represented by Joseph Wetzel, served via E-Service at  
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Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at  
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Apple Inc., represented by Mary C Mazzello, served via E-Service at  
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Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at  
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Copyright Owners, represented by Benjamin K Semel, served via E-Service at  
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Google LLC, represented by Gary R Greenstein, served via E-Service at  
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Joint Record Company Participants, represented by Susan Chertkof, served via E-Service  
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UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at  
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Signed: /s/ Joshua D Branson